

Critical Area Variances

Calvert County Board of Appeals

November 3, 2022

Overview

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 - Presumption
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History & Background of Critical Area Statute

What is the Critical Area Program?

- 1984 – Critical Area statute enacted
 - In response to the dramatic decline in water quality and productivity of Chesapeake Bay
- 1986 – Criteria approved by Joint Resolutions of the General Assembly
- Local governments required to adopt their own local programs based on State law and criteria
- 2002 – Statute amended to add Atlantic Coastal Bays to Critical Area
- 2008 – Comprehensive revision of the statute

Identification of the Critical Area

- All waters of the Chesapeake Bay, the Atlantic Coastal Bays, and their tributaries to the head of the tide
- All land under these waters
- All State and private wetlands
- All land and water areas within 1,000 feet of the landward edge of tidal waters and tidal wetlands

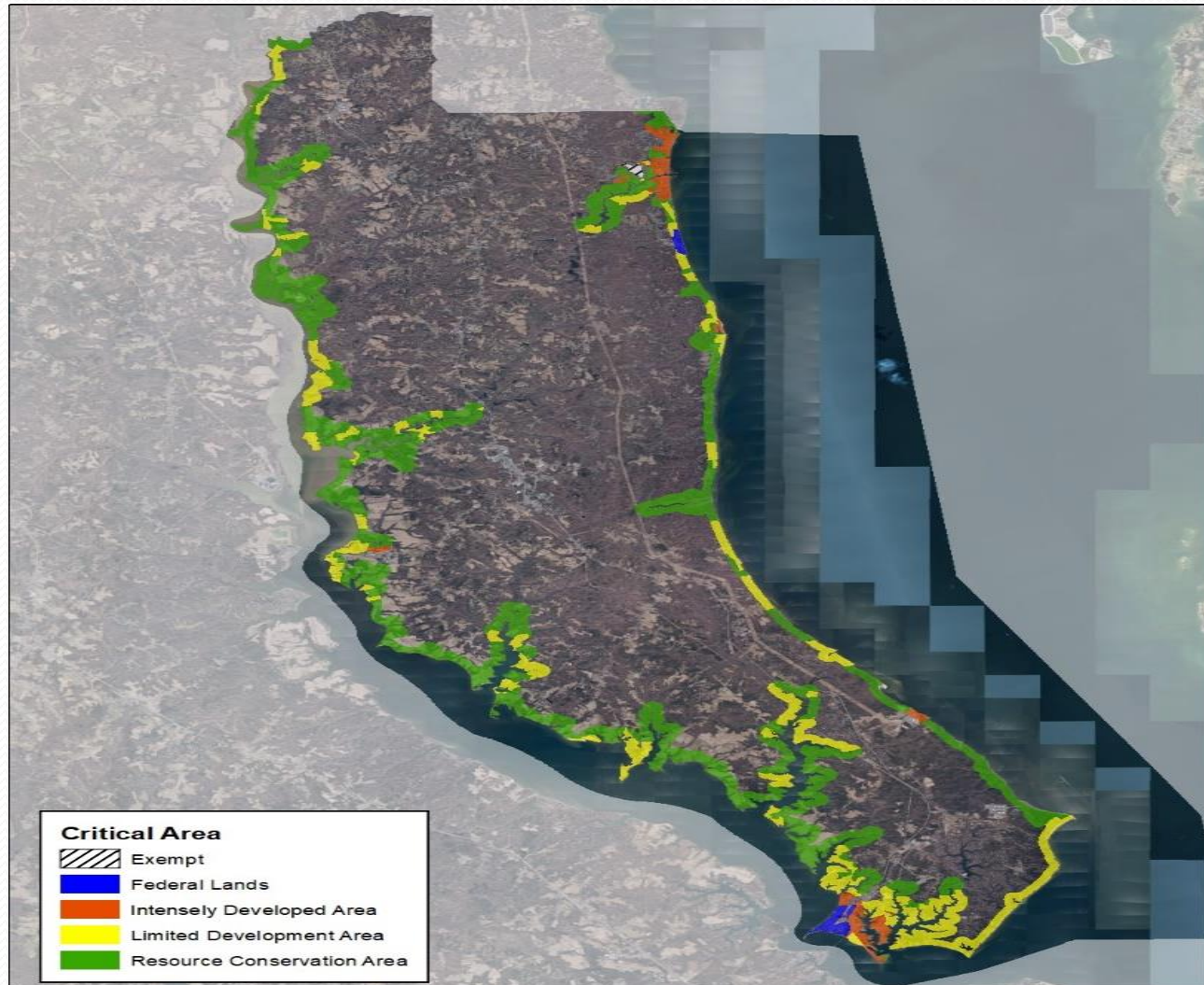
Affected Land Area

- 11% of the land area of the State
- 680,000 acres
- 52,000 miles of shoreline
- 16 counties, 45 municipalities, Baltimore City

Land Designations

- Resource Conservation Area (RCA)
 - Nature-dominated environments such as wetlands, forests, and fields and areas used for agriculture, forestry or fisheries activities
- Limited Development Area (LDA)
 - Areas of low or moderate intensity uses; contain areas of natural plant and animal habitats
- Intensely Developed Area (IDA)
 - Areas were residential, commercial, institutional and industrial developed land uses predominate and there is relatively little natural habitat

Calvert County Critical Area



Goals of the Critical Area Program

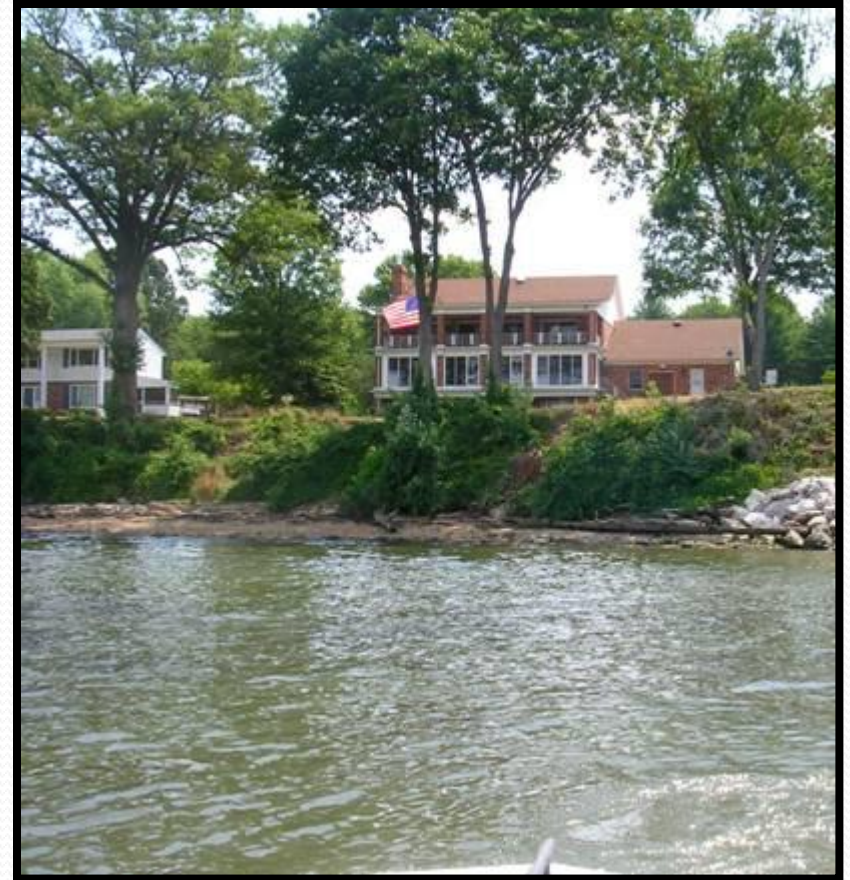
- Minimize adverse impacts to water quality from stormwater runoff
- Conserve fish, wildlife, and plant habitat
- Establish land use policies for development that:
 - Accommodate growth
 - Address the fact that the number, movement, and activities of people in the Critical Area can have adverse environmental impacts



Critical Area Variances

Typical Variance Applications

- Building on steep slopes
- New dwellings on vacant “grandfathered” lots in the Buffer
- Tear down and rebuild
- Additions, patios, decks in the Buffer
- Grading in the Buffer
- Exceeding lot coverage limits
- Exceeding clearing limits



Boards of Appeal Variance Jurisdiction

- Each county and municipality with land in the Critical Area may administer its own Critical Area Program approved by the State's Critical Area Commission
- One element of local Critical Area Program is authority to grant variances based on the standards under State law (NR 8-1808(c)(1)(iii)13.)
- Boards of Appeal have jurisdiction over Critical Area variances through procedures established in local Critical Area program (COMAR 27.01.12.02)

Presume That Variance Does Not Conform with Critical Area Law & Regulations

- Board must presume that the specific development activity for which the variance is required does not conform with the general purpose and intent of the State Critical Area law and regulations and the local Critical Area Program (NR 8-1808(d)(3)(ii))
- Based on competent and substantial evidence, Board shall make written findings as to whether applicant has overcome the presumption (NR 8-1808(d)(4)(ii)1.)

Burdens of Proof & Persuasion on Applicant

An applicant has the burden of proof and the burden of persuasion to overcome the presumption that the variance application does not conform with the general purpose and intent of the Critical Area statute, regulations, and local Critical Area program. (NR 8-1808(d)(4)(i))

State Law Variance Standards Apply

Notwithstanding any provision of a local law or ordinance, or the lack of a provision in a local law or ordinance, all of the provisions of NR 8-1808(d) shall apply to and shall be applied by, a local jurisdiction in the consideration, processing, and decision on an application for a variance. (NR 8-1808(d)(9))

Variance Standards

Under COMAR 27.01.12.04B(1) through B(7), a Board may not grant a variance unless Board makes written findings that the applicant has satisfied each variance standard:

- B(1) Due to special features of a site or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the local Critical Area program would result in an unwarranted hardship to the applicant;
- B(2) A literal interpretation of the local Critical Area program would deprive applicant of a use of land or structure permitted to others in accordance with the provisions of the local Critical Area program;
- B(3) The granting of the variance would not confer upon the applicant any special privilege that would be denied by the local Critical Area program to other lands or structures in accordance with the provisions of the local Critical Area program;

Variance Standards, Cont'd

Under COMAR 27.01.12.04B(1) through B(7), a Board may not grant a variance unless Board makes written findings that the applicant has satisfied each variance standard:

- B(4) The variance request is not based upon conditions or circumstances that are the result of actions by the applicant;
- B(5) The variance request does not arise from any conforming or nonconforming condition on any neighboring property;
- B(6) The granting of the variance would not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's local Critical Area; and
- B(7) The granting of the variance would be in harmony with the general spirit and intent of the Critical Area law, the regulations, and the local Critical Area program

Need for Variance

- Need for CA variance “must be substantial and urgent and not merely for the convenience of the applicant.”
- As a general rule, variances are “granted sparingly, and under exceptional circumstances.”

Belvoir Farms v. North, 255 Md. 259, 276-77 (1999).

Unwarranted Hardship

- COMAR 27.01.12.04B(1)
- **Without the variance, applicant would be denied reasonable and significant use of the entire parcel or lot**
- Consider special features of the site relating to an applicant's land or structure
- The fact that a Buffer exists isn't an unwarranted hardship
- Very high standard – goes well beyond “practical difficulty” (strengthened by General Assembly in 2004)
- Should not consider:
 - Landowner convenience
 - Owner not knowing regulations

Unwarranted Hardship Found

- In order to establish an unwarranted hardship, “the applicant has the burden of demonstration that, without a variance, the applicant would be denied a use of the property that is **BOTH significant and reasonable.**” (emphasis added)
- “In addition, the applicant has the burden of showing that such a use cannot be accomplished elsewhere on the property without a variance.”

Assateague Coastal Trust v. Schwalbach, 448 Md. 112, 139 (2016)

Unwarranted Hardship Not Found

- Applicant could build outdoor living space that offered him protection from the sun elsewhere on the property (i.e., outside of the Buffer and steep slopes).
- The mere fact that the Applicant “wanted to construct the proposed structure to the west of the Property because it was a less ‘awkward’ spot is not a sufficient reason to justify the granting of the variance.”

Wagner v. Anne Arundel County Board of Appeals, Court of Special Appeals, No. 2448, Sept. Term 2016 (Jan. 23, 2018) - Unreported

Unwarranted Hardship Not Found

- “When a variance would be required to build within the critical area buffer, for example, the fact that a particular improvement would enhance the owner’s enjoyment of the property did not establish that it would be a hardship to continue using the property without the variance.”
- “Mere convenience” of having a garage is insufficient to establish unwarranted hardship

Chesley v. City of Annapolis, 176 Md.App. 413, 435-36 (2007)

Deprived of Use or Structure Permitted to Others Under the Program

- COMAR 27.01.12.04B(2)
- Applicant deprived of use of land or structure enjoyed by others under Critical Area Program
- Other land should be physically similar (size, shape, topography)
- Compare to surrounding properties developed under local program (i.e., not grandfathered / nonconforming parcels)



No Special Privilege Conferred

- COMAR 27.01.12.04B(3)
- Approval must not allow activities that would be denied elsewhere in the Critical Area
- Difficult not to personalize
- Board's consideration of "unique needs" of applicant often lead to special privilege
- Board cannot consider other environmental stewardship activities



Variance Not Related to Actions by the Applicant

- COMAR 27.01.12.04B(4)
- General Assembly requires that jurisdictions shall consider whether a hardship is self-created
- Variance should not be based on applicant's actions – i.e., construction/disturbance without authorization

Variance Not Related to Off-Site Conditions



- COMAR 27.01.12.04B(5)
- Variance should not relate to conditions on a neighboring property
- Variance should not be based on impacts associated with removal

No Adverse Impacts on Water Quality or Habitat

- COMAR 27.01.12.04B(6)
- Impacts of individual variances may seem small
- Law specifically addresses cumulative impacts
- Must consider many variances over time (e.g., parcel history, same request over and over)
- Must consider overall environmental sensitivity of the ecosystem



Harmony with Spirit and Intent of the Critical Area Program



- COMAR 27.01.12.04B(7)
- Can a variance be avoided?
- Can the request be reduced, relocated, or reconfigured?
- Mitigation should address water quality and habitat
- Mitigation should be in addition to penalties or restoration for a violation

Critical Area Commission's Role in the Variance Process

- Review and comment based on information submitted
- Provide a state-wide perspective and consistent guidance in the application of variance standards
- Site visits as appropriate
- Technical assistance and design guidance
- Try to eliminate need for a variance or minimize impacts
- Appear before BOAs as appropriate

After-the-Fact Variances

- Local jurisdiction may not issue after-the-fact variance unless the applicant has:
 - Fully paid all penalties
 - Prepared restoration or mitigation plan, approved by local jurisdiction
 - Performed abatement measures in the approved plan
- NR 8-1808(c)(4)

Decisions by Boards of Appeal

- Based on an accurate site plan
- Address overall lot conditions, including any unique site conditions
- Written findings, based on competent and substantial evidence, that applicant overcame presumption of non-conformity with the law
- Determination that applicant met burdens of proof and persuasion

Decisions by Boards of Appeal – Cont'd

- Written findings for each Critical Area variance standard (COMAR 27.01.12.04B(1) thru B(7)), in addition to local program variance standards
- No substituting other agency's regulatory criteria for State Critical Area law and regulations
- Analyze whether there is an unwarranted hardship
- Identify lack of a reasonable and significant use of the parcel without variance

Sufficient Findings and Reasoning to Support Conclusions

- The BOA's opinion contained clear adverse findings, as well as summaries of substantial evidence supporting those findings.
- There has to be articulated evidence in support of a conclusory finding to enable meaningful judicial review.
- In contrast, when a BOA merely states conclusions, without pointing to the evidentiary bases for those conclusions, such findings are not amenable to meaningful judicial review.

Critical Area Commission for the Chesapeake and Atlantic Coastal Bays v. Moreland, 418 Md. 111, 128 & 134 (2011)

Appeal Process


- Critical Area Commission has standing to appeal decisions
- 30 days to file Petition for Judicial Review in Circuit Court



Photo by Jimmy Emerson



Questions?



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